BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of:	)	
	)	Gen Docket No. 90-314
	)	ET Docket No. 92-100
Amendment of the Commission's	)	RM-7617, RM-7760, RM-7780,
Rules To Establish New Narrowband	)	RM-7860, RN-7997, RM-7978
Renewal Communications Services	)	RM-7979, RM-7980, PP-4,
	)	PP-36, PP-37, PP-79 and
	)	PP-80

To: The Commission

COMMENTS OF PAGING NETWORK, INC. ON NABER'S PETITION FOR RECONSIDERATION

Paging Network, Inc. ("PageNet"), by its attorneys, hereby offers its comments on the Petition for Reconsideration of the Commission's Third Report and Order ("Third Report") in the above-referenced proceeding filed by the National Association of Business and Educational Radio, Inc. ("NABER"). While PageNet generally supports the rule modifications urged by NABER, these Comments will focus on NABER's proposal for a change in the eligibility criteria for these new channels and the need for further changes in those criteria.

PageNet supports NABER's proposed revision to the Rules which would replace the requirement that an applicant must already be operating a transmitter in the MTA or BTA in which it seeks to use a response channel with a requirement that the applicant paging operator's existing facilities serve at least part of the relevant MTA or BTA. For the reasons set forth below, PageNet also concurs with NABER that the Commission should make it clear that the June 24, 1993 cut off date in Section 24.130 of the rules, 47 C.F.R.

§ 24.130, does not apply to the criterion requiring the applicant to already be offering service in the area for which a response channel is sought.

In addition to the changes proposed by NABER, PageNet suggests that the Commission further revise its eligibility criteria for applicants for the 12.5 kHz channels to remove the requirement that applicants will be limited to those who were licensees under Parts 22 or 90 on June 24, 1993. This provision is not needed to prevent speculative or frivolous applications under an auction regime and here appears to serve no purpose other than arbitrarily to deprive some paging operators of an opportunity to upgrade their existing systems. Moreover, even if use of a cut-off date were justified, the appropriate date would be February 3, 1994 when the rule was modified to include a cut-off date, not June 24, 1993.

I. BACKGROUND

Because the new narrowband rules provide response channels for many of the frequencies being allocated, comments in the original rulemaking noted that this could leave existing licensees with inferior systems, and they accordingly requested that some response channels also be made available for use by those licensees. See e.g., Comments fild by PageMart, Pactel and Motorola in Gen. Docket 90-314. The Commission agreed to make such an allocation saying "this will permit existing paging operations to be upgraded and provide some acknowledgment and messaging capability. We will therefore provide 8 - 12.5 kHz channels for use by existing common carrier and private paging licensees." First Report and Order, 8 FCC Rcd 7162 (1993), 73 RR 2d 435, 441 (1993) ("First

Report"). The rule then adopted contained a footnote stating that "[T]hese mobile station frequencies are restricted to entities licensed under Parts 22 and 90 of this Chapter." In its Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994) ("Reconsideration Order"), the Commission found that this part of the Rule required clarification and revised it to limit eligibility to those who were both (a) licensees on June 24, 1993 (the date the First Report was adopted) and (b) operating at least one base station in the market for which a response channel is sought.

In revising these rules, the Commission was reacting to the reconsideration petition of PageMart, Inc. Id. at 1312. PageMart's concern, however, was whether the 12.5 kHz channels would actually be used by licensees "to upgrade their systems." PageMart Petition for Reconsideration at 7-8. PageMart did not there make any argument or showing that these response channels should be available only to those who were licensees as of June 24, 1993. PageNet respectfully suggests that the adoption of this cut-off date is regulatory overkill inconsistent with the public interest.

II. ARGUMENT

The public interest requires that operators of all systems without response channels be given a fair and equal opportunity to upgrade their systems. The ability to improve service should not be arbitrarily restricted to those who were licensees on a certain date. In considering who should be eligible to bid on unpaired 12.5 kHz channels in a particular MTA or BTA, the Commission should modify its rules as necessary to permit applications for

these 12.5 kHz channels by any licensee operating a system serving at least some portion of the market applied for on the date the application for a response channel is filed.

A. Restricting Applicants to Those Who Were Licensees on June 23, 1993 Is To Relegate Unnecessarily and Unreasonably to Permanent Second Class Status All Paging Systems Developed since June 23, 1993.

Those who were licensees prior to June 23, 1993 can bid for these new response channels to offer technologically advanced service and companies participating in the new narrowband licensing proceeding can bid for technologically advanced systems but under Section 99.130 companies, like PageNet, who have established systems subsequent to June 24, 1993 under a new licensee name would have no opportunity to apply for additional spectrum to permit them to offer technologically advanced service on these recently established systems.

This needless discrimination is particularly unfair because the June 24, 1993 restriction was first imposed in the Commission's February 3, 1994 Reconsideration Order, released March 4, 1994. No explanation was given for selecting that date other than the fact that the First Report had been adopted on that date. Reconsideration Order at 1313. Nor does the First Report contain any discussion that would justify a distinction between those who held 900 MHz paging authorizations on June 23, 1993 and those who acquired exactly the same type of licenses thereafter. Those later licensees had and have no other opportunity to obtain a response channel for their systems, their paging systems can make exactly the same use of such a channel as the systems of pre-June 24, 1993 licensees and the public's only interest is in seeing that the license goes to the licensee who will make best

use of it. Under the current procedures a pre-June 24, 1993 licensee with a small system and little interest in expansion could apply for a response channel but another much larger and rapidly growing but post-June 24, 1993 system serving the same area could not even apply for a response channel even though it could make much better use of it.[1]

The exclusion of post-June 24, 1993 licensees is significant. The paging industry has been one of the fastest growing segments of the nation's telecommunications industry in recent years. PageNet alone has added nearly 1.5 million subscribers since June of 1993. According to "The State of the U.S. Paging Industry, 1993" (EMCI, 1994) 4.5 million paging subscribers were added in 1993, a million more than the 3.5 million new subscribers in 1992. In 1982 there were 1.8 million pagers in service but by the end of 1993 that number has grown to nearly 20 million and is projected to reach nearly 30 million by the end of 1997. Telocator, January 1994, at 29. Reflecting the intense competition within the industry, revenues per pager declined from $20 in 1988 to slightly more than $14 in 1993 and even lower in major markets where competition is most intense. Id. In the face of this robust growth and competition it simply makes no sense to pursue this anti-competitive course of limiting the potential for improving service to those who were licensees on June 24, 1993 or to systems operating in the relevant MTA or BTA at that time. The public's interest is in receiving the best possible service and that interest can be served only by allowing all systems the chance to

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[1] Indeed, the way the rule is written, a post June 24, 1993 licensee would not be eligible to apply for the frequency even if no pre-June 24, 1993 licensee applied for it.

improve their service on a fair and equal basis. The use of the auction procedures will assure that these frequencies will be used to serve the public in the most efficient way.

While permitting post-June 24, 1993 licensees to apply and participate in auctions might increase competition for these frequencies, that competition, channeled through the auction procedures, is precisely the mechanism chosen by the Commission to permit it "to award licenses quickly to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public." Third Report, at ¶ 6. In this way licenses are placed "in the hands of the parties able to use them most efficiently." See, Second Report and Order, 75 RR 2d 1, 8 (1994). By arbitrarily limiting the eligible bidders to those who were licensees on June 24, 1993 and thereby excluding those who have been rapidly expanding since that date, the Commission undercuts the very premises which led it to use auctions as a means of awarding licenses in the first place.

If, as we believe to be the case, the Commission's basic intent in allocating frequencies for these response channels was to provide an opportunity for systems without a response channel to obtain one, the proper point to determine eligibility is at the time applications are filed and that is the way the rule originally adopted in the First Report reads. Parties applying for new paging authorizations subsequent to issuance of the First Report and up to at least February 3, 1994, when the Reconsideration Order was adopted would have no reason to doubt their eligibility to obtain one of these response channels. In the absence of a revision of the rule, however, they would appear to

be excluded. The Commission never offered any justification for limiting eligibility to those who were licensees on June 24, 1993 or explained why that date was chosen rather than February 3, 1994 when the cut-off date was adopted. PageNet respectfully submits that no case has been made for the adoption of a cut-off date but even if one could be made, the proper date would be February 3, 1994, not June 24, 1993.

B. The Cut-off Date Is Not Needed And Its Applicability Is Unclear

Cut-off dates are typically used to recognize some substantial equity on the part of existing parties or to deter speculative or frivolous fillings. There may be some situations where a cut-off date may properly be used to bestow a valuable advantage upon only a portion of a class (for example where new more restrictive rules are given only prospective effect and existing licensees are permitted to continue operating under the former rules),[2] but this is unwarranted here. Television licensees in operation when the HDTV proceedings began, for example, have been given no greater claim to use of spectrum than those licensed later. See, Advanced Television System and Their Impact upon the Existing Television Broadcast Service. MM Docket No. 87-268, 3 FCC Rcd 6520 (1988).

In the Third Report, the Commission has adopted auction procedures for awarding licenses for these frequencies which should relieve any concerns about possible speculative or frivolous filings. By requiring licensees to pay market value for their frequencies speculators will be denied the opportunity to

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[2] See, e.g., § 73.3555 n.4 (grandfathering pre-existing broadcast ownership inconsistent with revised rules).

obtain the frequency for nothing and then profit on its resale. As the Commission has noted, "[w]here competing applicants are required to bid, . . . the risk of frivolous applications is likely to be significantly less than under selection procedures previously used." Regulatory Treatment of Mobile Services, GN Docket No. 93-252, rel. May 20, 1994, Further Notice of Proposed Rulemaking at ¶ 122. Accordingly, to the extent the June 24, 1993 cut-off date may have been seen as a means to preclude such filings, that objective can be achieved through use of the auction process without the use of a cut-off date. As it considers finalization of these auction and application procedures, therefore, it is appropriate for the Commission to remove this restriction which does not appear to serve any purpose.

The rule, moreover, even as revised, is unclear. Under the two eligibility criteria, the applicant must be "a paging licensee authorized under Part 22 or Part 90 as of the adoption date of the First Report, June 24, 1993. In addition, the existing paging licensee must operate at least one base station in the MTA or BTA for which it requests a paging response channel." Nothing in the revised § 99.130 or in the Reconsideration Order states that the second eligibility condition also had to exist on June 24, 1993. As NABER has argued, such an interpretation would be unwise. Were the rule to be so interpreted, it would bar, for example, an application by a company holding a Part 90 license for a station which had been authorized but not yet been constructed on June 24, 1993, even though now operational, while accepting an application by a Part 90 licensee whose license had been granted on the same

day but had minimally constructed prior to June 24, 1993.[3] What equities the latter licensee has to warrant such disparate treatment are not apparent.

A further anomaly arises from the requirement that the applicant for these response channels must have been a licensee on June 24, 1993. Under such a rule an applicant for a response channel in Atlanta could participate in the auction for that channel if the applicant was a licensee anywhere on the June 24, 1993 date[4] and subsequently operated a station in the Atlanta MTA. In contrast, PageNet, which typically operates through market specific subsidiaries, was a "licensee" through its subsidiaries in many states on the June 24, 1993 cut-off date but if after that date it become a "licensee" in the Atlanta MTA through a new rather than an existing subsidiary it would be barred from the applying for a response channel. Again, we see no rationale which would justify such disparate treatment of essentially similar situations. While we believe that the cut-off date should be eliminated, at a minimum the Commission should make it clear that an applicant would qualify if it or an affiliate was a licensee on the cut-off date.

CONCLUSION

PageNet endorses the modifications sought by NABER but respectfully suggests that the use of a June 24, 1993 cut-off date

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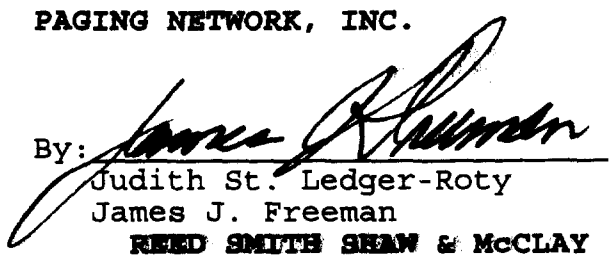
3 We are mindful of the fact that under Part 90 procedures there is no way to tell from Commission records if or when a licensee has constructed since the construction notification is only received at the end of the authorized construction period regardless of when the station commenced operations.

4 Assuming that the second eligibility condition is not linked to that date.

for applicant eligibility is inappropriate and contrary to the public interest. Even if upon further consideration the Commission concludes that use of a cut-off date is proper, it should use February 3, 1994 when parties were first put on notice of this eligibility requirement, not June 24, 1993.

Respectfully submitted,

PAGING NETWORK, INC.

By: 

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CERTIFICATE OF SERVICE

I, Jette Ward, hereby certify that on this 27th day of June, 1994, a true and correct copy of the foregoing "**COMMENTS OF PAGING NETWORK, INC. TO PETITION FOR RECONSIDERATION**" was sent U.S. first-class mail, postage prepaid, to the following:

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